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In The

Supreme Court of the United States

October Term, 1982

STATE OF IDAHO ex rel. CECIL D. ANDRUS, Governor, WAYNE L. KIDWELL, Attorney General, JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATES of OREGON and WASHINGTON,

Defendants.

PLAINTIFF STATE OF IDAHO'S REPLY TO WASHINGTON'S RESPONSE BRIEF

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PLAINTIFF STATE OF IDAHO'S REPLY TO WASHINGTON'S RESPONSE BRIEF

Introduction

In compliance with the order of this Court dated October 4, 1982, Idaho filed its exceptions to the report of the Special Master. Defendants Oregon and Washington chose not to file any exceptions. On December 15, 1982, Washington mailed its response to Idaho's exceptions. Idaho believes that further comment beyond those contained in its original brief is necessary on two points. First,

the Bonneville Dam/Ice Harbor and Bonneville Dam/Lower Granite Dam ratios presented by Washington mischaracterize what actually happens as the fish pass the dams (Washington's Brief at 14, 15, 37-39, 43-45). Second, Washington cannot now question the Master's finding that this case presented a justiciable controversy and that Idaho had a right to a share of the anadromous fish destined to return to Idaho (Washington's Brief at 15-33).

ARGUMENT

I. Washington's calculations of the ratios of anadromous fish passing Bonneville Dam and reaching the Ice Harbor or Lower Granite Dams mischaracterize what actually happens.

Washington's Response Brief (at 37-45) contains several "calculations" purporting to set forth ratios between fish passing Bonneville Dam and fish reaching Ice Harbor or Lower Granite Dams. Washington's calculations improperly characterize what happens during fish passage over the dams on the Columbia and Snake rivers for several reasons. First, Washington uses only the number of fish passing Bonneville Dam and makes no allowance for the substantial Indian harvest that occurs in the Zone 6 fishery above the dam. In each of three years, the reported Indian harvest was over 30,000 spring chinook (Master's Report at 46, 47). For steelhead, the reported Indian harvest exceeded 25,000 fish in each of four years (Master's Report at 50-51). Obviously, fish taken in this fishery cannot reach Ice Harbor Dam on the Snake River. To account for this fishery, the upriver escapement figure must be used (Bonneville Dam count minus fish taken in the Indian fishery). This is also the figure used by defendants in managing the anadromous fish resource pursuant to the Columbia River Five-Year Plan (Exhibit I-18).

Second, this suit involves fish of Idaho origin, and Washington's failure to consider what portion of the run is of Idaho origin magnifies the ratios. Again, it is obvious that fish continuing up the Columbia River or turning off into Washington and Oregon tributaries below the mouth of the Snake River could never pass over Ice Harbar Dam. Between Bonneville Dam and Ice Harbor Dam, numerous river systems support anadromous fish, including White Salmon, Klickitat, Wind, Hood, Deschutes, John Day, Umatilla, and Walla Walla Rivers as well as the Columbia River above its confluence with the Snake River. See, Oregon's and Washington's Answers to Idaho's Interrogatories, numbers 7, 11, and 14.

Third, Washington agreed that "(p)assage mortality rates for adult spring and summer chinook salmon at Columbia River dams depend in large part upon flow conditions on the main stem Columbia River" (Pre-Trial Order, Agreed Fact 20) and was recognized by this Court in *Idaho ex rel Evans v. Oregon,* 444 U.S. 380, 388, 389 (1980). Washington further agreed that "(b)ecause of passage losses, it requires from 2.5 to 4 fish, depending on passage conditions, to return one additional spring chinook salmon to Idaho's portion of the Snake River" (Pre-trial Order, Agreed Fact 27). It should be pointed out that these ratios above pertain to all fish entering the river, and not only those destined to return up the Snake River. Thus if only fish destined to return to Idaho are considered, these ratios would be lower.

The ratios of fish destined to return to Idaho passing above Bonneville Dam *and* the Indian fishery and over Ice Harbor and Lower Granite Dams are presented below in Tables 1, 2 and 3.

TABLE 1. SUMMARY OF DATA FOR IDAHO ORIGIN SPRING CHINOOK SALMON

Year	Upriver Escapement[1]	Percent Idaho Origin Fish[2]	No. of Idaho Origin Fish In the Upriver Escapement[3]	No. of Idaho Fish Escaping Over Ice Harbor Dam[4]	Idaho Upriver Escapement /Idaho Ice Harbor Escapement (Ratio)	No. of Idaho Fish Escaping over Lower Granite Dam[5]	Idaho Upriver Escape-ment/ Idaho Lower Granite Escape-ment (Ratio)
1962	87,400	42	36,700	27,600	1.33		
1963	66,300	42	27,800	22,000	1.26		
1964	80,100	31	24,800	19,900	1.25		
1965	64,600	22	14,200	10,000	1.42		
1966	110,400	41	45,300	36,000	1.26		
1967	73,100	49	35,800	29,200	1.23		
1968	83,200	69	57,400	36,700	1.56		
1969	140,600	68	95,600	42,700	2.24		
1970	97,000	68	66,000	39,300	1.68		
1971	112,800	53	59,800	26,700	2.24		
1972	143,300	60	86,000	41,200	2.09		
1973	107,900	70	75,500	49,700	1.52		
1974	68,600	42	28,800	15,800	1.82		
1975	NA	NA					
1976	78,300	47	36,800	20,600	1.79	16,800	2.19
1977	119,500	52	62,100	36,400	1.71	31,800	1.95
1978	128,900	53	68,300	40,400	1.69	33,600	2.03
1979	51,400	24	12,300	7,500	1.64	6,200	1.98
1980	61,00	21	12,800	8,000	1.60	5,600	2.29

[1] Bonneville Dam count minus the Indian harvest in Zone 6.

[2] See Exhibit I-30.

[3] Upriver escapement times percentage of Idaho origin fish.

[4] Ice Harbor Dam count times percentage of Idaho origin fish in the Snake River (82%) (Tr. 667-668). Ice Harbor Dam count from Master's Report, Appendix A at 46-47.

[5] Lower Granite Dam count times percentage of Idaho origin fish in the Snake River (82%). (Transcript 667-668). Lower Granite Dam count from Master's Report, Appendix A at 46-47.

TABLE 2. SUMMARY OF DATA FOR IDAHO ORIGIN SUMMER CHINOOK SALMON

Year	Upriver Escapement[1]	Percent Idaho Origin Fish[2]	No. of Idaho Origin Fish In the Upriver Escapement[3]	No. of Idaho Fish Escaping Over Ice Harbor Dam[4]	Idaho Upriver Escapement /Idaho Ice Harbor Escapement (Ratio)	No. of Idaho Fish Escaping over Lower Granite Dam[5]	Idaho Upriver Escape-ment/ Idaho Lower Granite Escape-ment (Ratio)
1962	76,300	44	33,600	25,100	1.34		
1963	59,900	36	21,600	17,100	1.26		
1964	73,600	35	25,800	20,300	1.27		
1965	69,100	25	17,300	12,100	1.43		
1966	70,900	25	17,700	13,900	1.27		
1967	86,200	36	31,000	24,800	1.25		
1968	80,800	47	38,000	24,200	1.57		
1969	92,800	61	56,600	25,300	2.24		
1970	61,500	43	26,400	15,900	1.66		
1971	72,100	67	48,300	21,800	2.22		
1972	66,400	59	39,200	18,700	2.10		
1973	43,400	37	16,100	10,500	1.53		
1974	34,000	45	15,300	8,400	1.82		
1975	44,400	24	10,700	6,300	1.70	7,100	1.51
1976	42,100	35	14,700	8,200	1.79	8,100	1.81
1977	41,000	30	12,300	8,400	1.46	6,900	1.78
1978	43,000	33	14,200	8,500	1.67	9,700	1.46
1979	34,200	10	3,400	2,100	1.62	3,000	1.13
1980	31,100	14	4,400	2,700	1.63	2,800	1.57

[1] Bonneville Dam count minus the Indian harvest in Zone 6.

[2] See Exhibit I-30.

[3] Upriver escapement times percentage of Idaho origin fish.

[4] Ice Harbor Dam count times percentage of Idaho origin fish in the Snake River (82%) (Tr. 667-668). Ice Harbor Dam count from Master's Report, Appendix B at 48-49.

[5] Lower Granite Dam count times percentage of Idaho origin fish in the Snake River (82%). (Transcript 667-668). Lower Granite Dam count from Master's Report, Appendix B at 48-49.

TABLE 3. SUMMARY OF DATA FOR IDAHO ORIGIN SUMMER STEELHEAD

Year	Upriver Escapement[1]	Percent Idaho Origin Fish[2]	No. of Idaho Origin Fish In the Upriver Escapement[3]	No. of Idaho Fish Escaping Over Ice Harbor Dam[4]	Idaho Upriver Escapement /Idaho Ice Harbor Escapement (Ratio)	No. of Idaho Fish Escaping over Lower Granite Dam[5]	Idaho Upriver Escape-ment/ Idaho Lower Granite Escape-ment (Ratio)
1962	162,500	71	115,400	82,200	1.40		
1963	119,900	61	73,100	52,900	1.38		
1964	109,500	53	58,000	41,700	1.39		
1965	152,400	41	62,500	44,700	1.40		
1966	139,800	46	64,300	46,700	1.38		
1967	104,200	42	43,800	31,400	1.39		
1968	97,100	98	95,200	58,500	1.63		
1969	125,200	59	73,900	45,400	1.63		
1970	99,800	62	61,900	38,300	1.62		
1971	167,500	46	77,000	47,600	1.62		
1972	156,500	47	73,600	45,200	1.63		
1973	129,800	34	44,100	27,500	1.60		
1974	122,400	12	14,700	8,900	1.65		
1975	77,100	24	18,500	11,500	1.61	12,300	1.50
1976	113,600	24	27,300	17,000	1.61	16,300	1.67
1977	160,300	39	62,500	38,900	1.61	37,600	1.66
1978	86,500	36	31,100	19,200	1.62	21,400	1.45
1979	106,500	25	26,600	16,400	1.62	17,800	1.49
1980	122,800	48	58,900	35,600	1.65	28,800	2.05

[1] Bonneville Dam count minus the Indian harvest in Zone 6.

[2] See Exhibit I-30.

[3] Upriver escapement times percentage of Idaho origin fish.

[4] Ice Harbor Dam count times percentage of Idaho origin fish in the Snake River (71%) (Tr. 667 and 668). Ice Harbor Dam count from Master's Report, Appendix C at 50-51.

[5] Lower Granite Dam count times percentage of Idaho origin fish in the Snake River (71%). (Transcript 667-668). Lower Granite Dam count from Master's Report, Appendix C at 50-51.

A. Spring Chinook

During the 19 year time period (1962-1980) after construction of Ice Harbor Dam, the Upriver Escapement/Ice Harbor Dam ratios for Idaho origin spring chinook varied from 1.23 in 1967 to 2.24 in 1969 and 1971 (Table 1). This is different from the ratios calculated by Washington of 2.3 in 1973 to 4.5 in 1974 (Washington's Brief at 43).

During the six year period from 1975-1980 after the completion of Lower Granite Dam, the Upriver Escapement to Lower Granite Dam ratios for Idaho origin fish varied from 1.95 in 1977 to 2.29 in 1980 (Table 1). The ratios calculated by Washington for all upriver fish whether of Idaho origin or not varied to a much greater extent, from 3.1 in 1977 to 11.1 in 1980 (Washington's Brief at 14, 15 and 43). It should be noted that Washington's calculation of 11.1 for 1980 is in error and that the correct number by their method of calculation should be 9.0.

The adult return of Idaho fish in both 1979 and 1980 was severely reduced by a high smolt mortality during their downstream migration in the drought year of 1977. This resulted in record low contributions of Idaho fish to the upriver run in 1979 and 1980 (Exhibit I-30). The record low contribution of Idaho fish rather than high adult dam passage mortalities is responsible for the extremely inflated ratios displayed by Washington for 1979 and 1980.

B. Summer Chinook

From 1962-1980, the Upriver Escapement/Ice Harbor Dam ratios for Idaho origin summer chinook varied from a low of 1.25 in 1967 to a high of 2.24 in 1969 (Table 2).

These ratios contrast with a low of 2.9 in 1971 and a high of 3.6 in 1973, calculated by Washington (Washington's Brief at 44).

When the Upriver Escapement/Lower Granite Dam ratios are considered, the ratios for Idaho origin summer chinook vary from 1.13 in 1979 to 1.81 in 1976 (Table 2). Again, the ratios contrasted greatly with those calculated by Washington of 3.6 in 1978 and 9.5 in 1979 (Washington's Brief at 15 and 44). Again the high ratios in 1979 and 1980 are due to the record low contribution of Idaho fish to the upriver runs primarily because of the effects of the 1977 drought year rather than high adult dam passage mortalities.

C. Summer Steelhead

For Idaho origin summer steelhead during the period from 1962-1980, the Upriver Escapement/Ice Harbor Dam ratios ranged from 1.38 in 1963 and 1966 to 1.65 in 1974 and 1980 (Table 3). The ratios calculated by Washington were greatly different, varying from 2.9 in 1971 and 1972 to 10.9 in 1974.

The Upriver Escapement/Lower Granite Dam ratios for summer steelhead of Idaho origin varied from 1.45 in 1978 to 2.05 in 1980 (Table 3). Again these values contrasted greatly with those calculated by Washington for all upriver steelhead. Washington's ratios varied from 3.0 in 1980 to 5.3 in 1976 (Washington's Brief at 15 and 45). It should be noted that in the case of steelhead it is incorrect to relate the calendar year counts at Ice Harbor and Lower Granite Dams to the same calendar year count at Bonneville Dam as Washington has done. This is due

to the fact that the upriver run of steelhead over Bonneville Dam which begins in the spring and ends in November does not totally pass the Snake River Dams until May of the following year. Thus, on a calendar year basis the counts at Bonneville and the Snake River Dams are not comparable. Idaho has followed Washington's method in Table 3 simply for ease of comparison.

For the reasons given above, it is clear that the ratios presented by Washington do not accurately characterize passage mortalities that occur between the Columbia and Snake River Dams and grossly misrepresent the number of fish that must be allowed to pass upstream to provide for an Idaho harvest. As Idaho has pointed out in its earlier briefs, defendants could commercially harvest the non-Snake River fish in their tributaries as they are presently doing with a sports fishery. Thus, defendants would only have to forego a small reduction in their harvest of fish destined to return to Idaho. This is certainly a small price to pay in proportion to the benefits derived by preserving the resource and harvesting future runs.

II. Washington cannot raise now a claim that Idaho does not have a right to a share of the Idaho origin fish.

Washington's response brief (at 15-37) may be construed as taking exception to the Master's conclusion that this case presents a justiciable controversy (Master's Report at 25). If this was their intent, they may not now do so. This Court in an order dated October 4, 1982 said that parties must file their exceptions to the Special Master's Report within 45 days. Washington chose not to do so. They cannot now take exceptions to the Master's findings. In addition, this Court in *Evans,* supra at 392, recog-

nized that Idaho had a right to share in the harvest of fish destined for Idaho when they remanded this case to the Special Master for a trial on the merits.

CONCLUSION

For the reasons presented in this brief and in Idaho's exceptions, this Court should sustain Idaho's exceptions to the Master's Report and remand this case to the Special Master to adopt the Idaho Plan.

Respectfully submitted,

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